SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. [redacted] 21

VICTOR J. HERB,
Petitioner,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR.,
Receivers for Wabash Railway Company, a Corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 681.

VICTOR J. HERB,
Petitioner,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR.,
Receivers for Wabash Railway Company, a Corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The summary statement of petitioners refers to matters in no way involved in the proceeding now before this Court. The material facts are as follows:

On December 22, 1937, petitioner, as plaintiff, filed in the City Court of Granite City, Illinois, his complaint against respondents, as defendants (R. 7), under the Federal Employers' Liability Act (U. S. C., 1934 Ed., Tit. 45, Secs. 51-59), for personal injuries sustained by petitioner on the 23rd day of November, 1936, in or near the City of Decatur,

Illinois, and beyond the city limits of the City of Granite City, Illinois, alleging in said complaint a violation, by respondents, of the provisions of the Federal Safety Appliance Act (U. S. C., 1934 Ed., Tit. 45, Secs. 1-16) relating to hand brakes. A summons was issued by said City Court and served upon respondents (R. 12).

Thereafter, on the 16th day of March, 1942, the Supreme Court of Illinois filed opinions in two cases then pending in said court, namely, Werner v. Illinois Central Railroad Company, 379 Ill. 559, 42 N. E. (2d) 82, and Mitchell v. Louisville & N. R. Co., 379 Ill. 522, 42 N. E. (2d) 86, in each of which cases said Supreme Court held that the various City Courts, in Illinois, were without jurisdiction to hear and determine the subject matter of any action, the cause of which arose outside of and beyond the territorial limits of the City Court in which such action was pending. After learning of these decisions, petitioner, on June 17, 1942, filed a motion in the City Court of Granite City for a change of venue to the Circuit Court of Madison County, Illinois, under the provisions of an Illinois statute known as the **Venue** Act (Ill. Rev. Stat. 1941, Chap. 146, Par. 36), purporting to authorize a change of venue of a suit commenced in the wrong court or county, to a proper court or county. In this motion, which appears at page 24 of the transcript of record, petitioner stated: "This suit or action has been commenced, and is pending, in the **wrong court**, and the venue thereof should be changed to a proper court pursuant to the terms and provisions of Chap. 146, Par. 36, Illinois Revised Statutes 1941." (Emphasis supplied.) No other relief was prayed for in said motion, and authority to change the venue of this case from said City Court to said Circuit Court was based solely upon said last-named statute.

For the convenience of the Court, we quote the material part of said statute:

"That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this State, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then, upon motion of either or any of the parties to such suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same, when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue."

On July 17, 1942, petitioner's motion for change of venue was allowed by said City Court and the venue ordered changed to the Circuit Court of Madison County, Illinois (R. 5), and on July 31, 1942, more than five (5) years after petitioner was injured, and more than four (4) years after filing his complaint in said City Court, all of the pleadings and papers and a certified transcript of all orders in said cause, in the City Court of Grante City, were duly filed in the Circuit Court of Madison County as on change of venue (R. 1).

On August 21, 1942, respondents filed in said Circuit Court their motion to dismiss petitioner's alleged cause of action (R. 26). This motion was based principally upon two grounds, namely: (1) That all orders entered, and all pleadings had, in the City Court of Granite City, **including the order changing the venue thereof**, were void and of no effect, and that the statute (Ill. Rev. Stat. 1941, Chap. 146, Par. 36) authorizing a City Court to change the venue of an action, of which it has no jurisdiction, to a court having jurisdiction, is contrary to Section 1 of Article VI of the Constitution and is, therefore, void; and (2) that plaintiff did not "commence" his suit in a court, having jurisdiction of the subject matter or any court of competent jurisdiction, within two (2) years from the date

he sustained his injuries, as required by Section 6 of the Federal Employers' Liability Act (Sec. 56, Tit. 45, U. S. C. A.).

On November 27, 1942, the Circuit Court of Madison County sustained respondents' motion to dismiss, and dismissed said suit, and entered judgment against petitioner in bar of the action (R. 30-31). From that order and judgment petitioner (plaintiff) duly appealed to the Supreme Court of the State of Illinois (R. 32-33), where the judgment of the Circuit Court of Madison County, Illinois, was on September 24, 1943, affirmed (R. 35-44).

The opinion and decision of the Supreme Court of Illinois was based principally upon petitioner's (plaintiff's) failure to "commence" his suit in a court of competent jurisdiction, within two (2) years after sustaining his injuries, as required by Section 6 of the Federal Employers' Liability Act. This is apparent from the following statement of the Court in its said opinion, namely:

> "The material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same, as required by Section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time" (R. 37). • • •
>
> "It is clear a suit was not commenced by filing the present suit in the City Court of Granite City, or by issuing summons or filing a complaint. Lacking requisite jurisdiction **because of the provisions of the Constitution limiting it to cases arising within the limits of the city**, such Court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the Circuit Court of Madison County, some five years after the date of the accident,

by the filing of the transcript of orders entered in the City Court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction." (Emphasis supplied.)

QUESTION PRESENTED.

The only question presented on this record is, whether or not the Circuit Court of Madison County, Illinois, by reason of the order of the City Court of Granite City, Illinois, changing the venue of this cause to the Circuit Court, and by filing in said Circuit Court a transcript of the record of said City Court in said cause, acquired jurisdiction to hear and determine the same.

REASONS AGAINST ALLOWANCE OF THE WRIT AND AUTHORITIES IN SUPPORT THEREOF.

I.

The record in this case presents no federal question, and this Court is without jurisdiction to review the decision and judgment of the Supreme Court of Illinois.

(a) Whether or not a state court has jurisdiction of an alleged cause of action, although begun under the Federal Employers' Liability Act, does not present a federal question.

St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 285, 52 Law Ed. 1061, 1064;
Mondou v. N. Y. N. H. & H. R. Co., 223 U. S. 1, 58, 56 L. Ed. 327, 349;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148-149, 52 L. Ed. 143, 146;
John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, 383;
Manning v. Ketcham, 58 Fed. (2d) 948, 949.

(b) State courts derive their jurisdiction from the Constitution and laws of the states. The Federal Employers' Liability Act does not attempt to enlarge or regulate the jurisdiction of state courts, but only gives an injured person the right to file suit, under that act, in a state court, where such a court, **under the local law, has jurisdiction** to hear cases of that character, as Congress cannot confer jurisdiction upon any court which it has not created.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 285, 52 L. Ed. 1061, 1064;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148-149, 52 L. Ed. 143, 146;
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Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 222, 60 L. Ed. 961, 965;

Walton v. Pryor, 276 Ill. 563, 566-567, 115 N. E. 2;
Mo. River Tel. Co. v. First Nat'l Bank, 74 Ill. 217;
Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619;
Taylor v. Southern Ry. Co., 350 Ill. 139, 182 N. E. 805.

(c) The state laws and practice relative to the jurisdiction of State courts, the mode, time and manner of invoking that jurisdiction and the rules of practice, to be applied in its exercise, are no less applicable when federal rights are in controversy, than when the case turns entirely upon questions of local or general law.

John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, 383;
Goldenburg v. Murphy, 108 U. S. 162, 27 L. Ed. 686;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016.

(d) The proper construction, interpretation and effect of a State statute, being a question of local law and not federal law, the decision of a State court thereon is not subject to review by the federal Supreme Court on writ of error to the State court.

Knights of Pythias v. Meyer, 265 U. S. 30, 68 L. Ed. 885, 888;
Hotel & R. E. Int. v. Wisconsin E. R. Bd., 315 U. S. 437, 86 L. Ed. 946;
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113;
Morehead v. People ex rel. Tipaldo, 298 U. S. 587, 609, 80 L. Ed. 1347, 1354, 103 A. L. R. 1445, 1451;
Senn v. Tile Layers' Union, 301 U. S. 468, 477, 81 L. Ed. 1229, 1235;
Moore v. I. C. R. R. Co., 312 U. S. 630, 634, 85 L. Ed. 1089, 1092.

(e) U. S. Supreme Court, on writ of error, must accept, as final, the ruling of the State court of last resort on all matters of State law.

Fox River Paper Co. v. R. R. Com., 274 U. S. 651, 655, 71 L. Ed. 1279, 1283, 1284;
Saner v. N. Y., 206 U. S. 536, 51 L. Ed. 1176;
Kaukauna W. Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 272, 277, 35 L. Ed. 1004, 1010, 1012;
Brinkerhoff-Faris Trust & Sav. Co., 281 U. S. 673, 680, 74 L. Ed. 1107, 1113.

(f) Whether a State court has jurisdiction of a case or not is a question exclusively for the State court and its decision is not reviewable in the U. S. Supreme Court on certiorari.

Smith v. Adsit et al., 16 Wall. 185, 21 L. Ed. 310, 311.

(g) The decision of the Supreme Court of Illinois rests upon a nonfederal ground which independently and adequately supports the State court judgment. In such case this Court will not take jurisdiction.

Kalb v. Feurstein, 308 U. S. 433, 84 L. Ed. 370, 373;
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, at 164;
Chicago, B. & Q. Ry. v. Illinois ex rel. etc., 200 U. S. 561, 580;
West Chicago etc. R. Co. v. Illinois ex rel. etc., 201 U. S. 506, 519;
Murdock v. Memphis, 20 Wall. 590, 634;
Klinger v. Missouri, 13 Wall. 257, 263;
Lynch v. New York ex rel., 293 U. S. 52, 54;
Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476.

II.

Petitioner's alleged cause of action was not "commenced" in a court of competent jurisdiction within two years after said alleged cause of action accrued, as required by Section 6 of the Federal Employers' Liability Act.

(a) The City Court of Granite City was without jurisdiction to hear and determine petitioner's alleged cause of action, as it arose in or near Decatur, Illinois, and without the territorial limits of the City of Granite City. This is admitted by petitioner, both in his petition filed herein and by his motion for change of venue to the Circuit Court of Madison County, Illinois (R. 24).

Constitution of 1870, Article VI, Sec. 1;
People ex rel. Beebe v. Evans, 18 Ill. 361;
Covill v. Phy, 26 Ill. 432;
Joslyn v. Dickerson, 71 Ill. 25;
Hercules Iron Works v. Elgin, Joliet and Eastern Ry. Co., 141 Ill. 491, 30 N. E. 1050;
Miller v. People, 230 Ill. 65, 82 N. E. 521;
People ex rel. Sokoll v. Municipal Court, 359 Ill. 102, 194 N. E. 242;
Ladies of Maccabees v. Harrington, 227 Ill. 511, 81 N. E. 533;
Werner v. Ill. Cent. Ry. Co., 379 Ill. 559, 42 N. E. (2d) 82;
Mitchell v. L. & N. R. R. Co., 379 Ill. 522, 42 N. E. (2d) 86;
Smith v. L. & N. R. R. Co., 381 Ill. 55, 44 N. E. 841;
Herb v. Pitcairn, 384 Ill. 237, 51 N. E. (2d) 277.

(b) The Illinois Venue Act (Par. 36, Chap. 146, Ill. Rev. Stat. 1941), in so far as it authorized a change of venue in this case from the City Court of Granite City to the Circuit Court of Madison County, is in violation of Section 1, Article VI of the Constitution of 1870 of the State of Illinois and is therefore void; and the order of the City Court of

Granite City of July 17, 1942 (R. 5-6), changing the venue of this case to the Circuit Court, is null and void.

Authorities cited under II (a), supra.

(c) Petitioner's right to recover under the Federal Employers' Liability Act is conditioned: (1) Upon his "commencing" his action within two years from the date of his injury (that being the limitation period at said time); and (2) upon "commencing" such suit in a court having **jurisdiction to hear and determine the same.**

Sec. 6, Federal Employers' Liability Act (Sec. 56, Title 45, U. S. C. A. 1941);
Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433;
Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 60 L. Ed. 226;
Mo. K. & T. R. Co. v. Harriman Bros., 227 U. S. 657, 57 L. Ed. 690;
Bell v. Wabash Ry. Co., 58 Fed. (2d) 569, 571;
American R. Co. of Porto Rico v. Coranas, 230 Fed. 545, 546;
Fairclough v. Southern Pacific Co. (N. Y. App. Div. Sup. Ct.), 157 N. Y. S. 862;
Gulf, C. & F. S. Ry. Co. v. Gordon (Civil Appls. Court of Tex.), 218 S. W. 74;
Sweet v. Chattanooga Elec. Light Co. (Tenn.), 36 S W. 1090;
Walton v. Pryor et al., 276 Ill. 563, 568-569;
Cotton v. Wabash R. Co. (Iowa), 199 N. W. 1005;
Kavanaugh v. Folsom, 181 Fed. 401;
Herb v. Pitcairn, 384 Ill. 237.

(d) Petitioner, having predicated his case upon the Federal Employers' Liability Act, and having filed same in a court having no jurisdiction of the subject matter, has never "commenced" his suit, within the meaning of section 6 of said act.

Walton v. Pryor, 276 Ill. 563, 568-569, 115 N. E. 2;
Trapp v. B. & O. R. R. Co., 283 Fed. 655, 656;

Sweet v. Chattanooga Elec. Light Co. (Tenn.), 36 S. W. 1090;
Fairclough v. Southern Pacific Co. (N. Y. App. Div. Sup. Ct.), 157 N. Y. S. 862;
Gulf, C. & S. F. Ry. Co. v. Gordon (Civil Appls. Court of Tex.), 218 S. W. 74;
Inter-Southern Life Ins. Co. v. Pierce, 31 S. W. (2d) 692;
Willing v. Provident Trust Co., 21 Fed. Supp. 237, 238;
Manning v. Ketchem, 58 Fed. (2d) 948, 949;
State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762, 763;
Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71;
Vincent v. McElvain, 304 Ill. 160, 163, 136 N. E. 502;
C. J. S., Vol. 1, p. 1392;
C. J. S., Vol. 21, pp. 177-178;
C. J., Vol. 67, p. 147;
Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737;
Crowley v. Southern Ry. Co., 139 Fed. 851;
Denny v. Southern Pac., 263 Ill. App. 106.

III.

Removal of an action from a state court, which has no jurisdiction, to a federal court, confers no jurisdiction on the federal court, although it might in a like suit, originally brought there, have had jurisdiction.

Lambert Co. v. B. & O. R. Co., 258 U. S. 377, 382, 66 L. Ed. 671, 675;
Venner v. Michigan Central R. Co., 271 U. S. 127, 70 L. Ed. 868;
Bull v. Chicago M. & St. P. Ry. Co., 6 Fed. (2d) 329, 332;
Compton v. Carter Oil Co., 283 Fed. 22.

ARGUMENT.

I.

The record in this case presents no federal question and this Court is without jurisdiction to review the decision and judgment of the Supreme Court of Illinois.

Petitioner, admittedly, filed his suit in the wrong court, namely, the City Court of Granite City, Illinois, which had no jurisdiction. More than four (4) years after filing his suit in said court that Court, on petitioner's motion, pursuant to the Illinois Venue Act, hereinbefore referred to, changed the venue and transferred said cause to the Circuit Court of Madison County, Illinois, which latter court held that it did not acquire jurisdiction to hear the same, and said suit, on respondents' motion, was dismissed and a judgment, in bar of the action, was entered by said Circuit Court. This order and judgment was affirmed by the Supreme Court of Illinois, the highest court of that state. Whether or not the City Court of Granite City, a state court, had jurisdiction to try this case and if not to remove it to the Circuit Court pursuant to the Illinois Venue Act (Ill. Rev. Stat. 1941, Chap. 146, Sec. 36), are purely questions of local law and not federal questions. The jurisdiction of state courts is regulated entirely by the Constitution and laws of the several states and is not a matter of federal control. This is elementary and has repeatedly been so declared by this Court.

In St. Louis & Iron Mountain Railroad Company v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, plaintiff, as administratrix of the estate of George W. Taylor, brought suit in Arkansas under the Federal Employers' Liability Act against the railroad company to recover damages for the benefit of Taylor's widow and next of kin on account of his injury and consequent death, alleged to have been

caused by the company's negligence. The accident and death happened in the Indian Territory and the plaintiff obtained a judgment which was affirmed by the Supreme Court of Arkansas. The United States Supreme Court decided that the question of jurisdiction of the state court was not a federal question and that this Court had no jurisdiction to review the decision of the state court, holding that it had jurisdiction. In the opinion in that case this Court, on page 285 (52 L. Ed. 1064), said:

> "The plaintiff in error contends that of such a cause, triable as it was in the courts of the territory created by Congress, the courts of Arkansas have no jurisdiction. **This contention does not present a federal question.** Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. Chambers v. Baltimore & O. R. Co., 207 U. S. 142, ante, 143, 28 Sup. Ct. Rep. 34. We have, therefore, no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. **On that question the decision of that court is final.**" (Emphasis ours.)

In Chambers v. Baltimore & Ohio Railroad, 207 U. S. 142, 147, 52 L. Ed. 143, 146, this Court said:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them."

In John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, at page 383, this Court said:

> "Without any doubt, it rests with each state to prescribe the jurisdiction of its appellate courts, the

mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

It cannot be said that the Illinois courts, by refusing to assume jurisdiction in the instant case, denied petitioner, as far as jurisdiction is concerned, any right or privilege to prosecute his suit in a state court pursuant to Section 6 of the Federal Employers' Liability Act (U. S. C. A., Tit. 45, Sec. 56), which provides that the jurisdiction of the courts of the United States under said chapter shall be concurrent with that of the courts of the several states. This act does not confer any jurisdiction upon state courts or in any way enlarge their jurisdiction, as Congress is without authority to confer jurisdiction upon a state court, or any other court, which it has not ordained or established. This Court had occasion to construe this section of the act in question in the Employers' Liability cases, 223 U. S. 1, 56 L. Ed. 327, and said on page 349 (56 L. Ed.):

"There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, **when its ordinary jurisdiction, as prescribed by local laws**, is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. * * * It is true, the sovereignties (referring to the Federal Government and the several states) are distinct, and **neither can interfere with the proper jurisdiction of the other**, as was so clearly shown by the Chief Justice Taney in the case of Ableman v. Booth,

21 How. 506, 16 L. Ed. 169; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the Federal Constitution or laws are involved." (Emphasis supplied.)

In Walton v. Pryor, 276 Ill. 563, the Supreme Court of Illinois in construing this section of the federal act held that whether a Circuit Court in Illinois had jurisdiction of an action for damages under the Federal Employers' Liability Act must be determined by the laws and Constitution of Illinois, as Congress cannot confer jurisdiction upon any court which it has not created, and that there was no restriction in the Federal Constitution upon the power of a state to determine the limits of the jurisdiction of its courts, except that the state must give to citizens of other states the same rights that it accords to its own citizens. In that case the Court, on page 569 of the opinion, said:

"In view of the powers of the Federal Government and the states and in the light of the uniform decisions relating to the subject, this provision can only mean that when the jurisdiction of the courts of a state, **as fixed by local laws**, empowers them to hear and determine a certain class of actions, an action of that class arising under federal law may be enforced as of right in the state court."

This doctrine has been consistently followed both by this Court and state courts. Among the numerous decisions upholding this rule, we call the Court's attention to Minneapolis & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211, 222, 60 L. Ed. 961, 965, and Taylor v. Southern Ry. Co., 350 Ill. 139, ... N. E. ...

Petitioner bases his right to change the venue in this case to the Circuit Court solely upon a state statute, and insists that, by virtue of this statute, the City Court had a

limited jurisdiction to transfer the cause to a proper court. His position in this respect is repeatedly stated throughout his petition and brief. The Supreme Court of Illinois did not so hold, but commenting thereon, said (R. 39):

> "Apparently it is his contention that, having begun the suit in a court without jurisdiction of the subject matter, but having changed the venue thereof and transferred it to one that would have jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in the court, the judgment of which, if rendered upon such proceedings, would be wholly void."

The Court further said (R. 40):

> "If appellant's contention is sustained a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard when served upon them. This would give the order of transfer by the City Court the effect of vitalizing process that was void and considering a case commenced and pending in the proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised."

The Court further said (R. 42):

> "When the case was transferred to the Circuit Court of Madison County, some five (5) years after the date of the accident, by the filing of the transcript of orders entered in the City Court, and the pleadings and other documents, there was no 'commencement' of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of

jurisdiction. To hold the suit was started in the Circuit Court at the time when it was attempted to be commenced in the City Court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court, which up to that time must be considered as a nullity."

The Supreme Court of Illinois definitely held that the City Court had no jurisdiction to enter any order, and that the so-called Venue Act was not sufficient to bridge the chasm between the City and Circuit Courts. The proper construction, interpretation and effect of a state statute, **being a question of local law,** the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to the state court. See authorities, point I (d).

In Knights of Pythias v. Meyer, 265 U. S. 30, 68 L. Ed. 885, 888, this Court said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation as though such meaning had been specifically expressed therein."

Petitioner's position, that the City Court had limited jurisdiction to transfer this case to the Circuit Court, is based entirely upon his contention as to the holding of the Supreme Court of Illinois in Central Illinois Public Service Company v. Industrial Commission, 293 Ill. 62, 127 N. E. 80, which he says was followed in Gill v. Lynch, 367 Ill. 203, 10 N. E. (2d) 812. The Illinois Court did not so hold in either case. In the Central Illinois Public Service Company case the constitutionality of the Venue Act was not raised, nor was any section or provision of the State Constitution referred to or construed. In that case, a certiorari proceeding commenced in the Circuit Court of

Coles County was, pursuant to the Venue Act, transferred by said Circuit Court to the Circuit Court of Champaign County because defendant resided in that county and service could not be had upon him in Coles County. The Circuit Court, in making this transfer, only went so far as to determine what was the intention of the Legislature in enacting this statute. Whether the act was in violation of the Constitution or whether the Legislature had the power to pass the act was not raised or decided in that case. The Venue Act, in so far as it applies to **Circuit Courts**, is valid because there is no provision of the State Constitution which prohibits the Legislature from conferring this power upon such courts. Circuit Courts are authorized by the Constitution, with general powers, among which would be the power, constitutionality granted by the Legislature, to transfer the cause to another court. Section 12, Article VI of the Constitution of Illinois, 1870, provides:

> "The Circuit Court shall have original jurisdiction of all causes in law and equity."

There is no such constitutional provision pertaining to city courts. On the contrary, Section 1 of Article VI of the State Constitution expressly restricts and limits the inherent power of the Legislature, with reference to city courts, and the Supreme Court of Illinois has construed that provision of the Constitution to mean that the Legislature can bestow no power on city courts except such power as is authorized by that provision of the Constitution. See authorities respondents' brief II (a) and (b). However, the Supreme Court of Illinois, in its opinion in the instant case, refers to the Central Illinois Public Service Company case and the Gill case and says that its interpretation of the Venue Act in those cases is **against petitioner's contention** (R. 42).

Petitioner, on page 11 of his brief, says, "The question

of when a suit is commenced in a state court is a matter which the federal courts recognize as being controlled generally by the practice in the particular state," and in support of this cites a number of Federal Supreme Court decisions, and on page 19 of his brief he further states, "The practice and procedure in actions brought under the Federal Employers' Liability Act in a state court will be governed by the law of the state in which such court is located," citing authorities in support thereof. In view of these admissions by petitioner, there is nothing for this Court to review and the writ should be denied.

In Goldenburg v. Murphy, 108 U. S. 162, 27 L. Ed. 686, and other cases cited by petitioner, this Court has definitely held that the time and manner of "commencing" a suit, although brought under a federal statute, must be determined by the state law. In Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 317, 60 L. Ed. 1016, 1021, cited by petitioner, this Court said:

> "Although the present action was based upon a Federal statute, it was triable and tried in the state court; hence, local rules of practice and procedure were applicable. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 59 L. Ed. 1433, 1436 * * *; Minneapolis & St. L. R. Co. v. Bombolis, No. 478, this day decided (241 U. S. 211, ante)."

The Supreme Court of Illinois has decided that this case was not "commenced" in the state court within two (2) years, as required by the federal act. This is a question of local law for the state court and is not reviewable by the Federal Supreme Court. Not only does it appear that the decision of the Illinois Supreme Court rests upon a nonfederal question, but the transcript of record does not show what errors were assigned in that court on the appeal, or that any federal question was raised. Petitioner's motion for a change of venue filed in the City Court (R. 24), his petition for a rehearing, filed in the

State Supreme Court (R. 47), and his petition filed in this court, show that petitioner relies upon the Illinois Venue Act to transfer his case to the Circuit Court and to confer jurisdiction thereon. He raises no other question. This merely involves the construction and application by a state court of a state statute which is not a federal question and not subject to review by this Court. For this reason alone, certiorari in this case should be denied.

II.

Petitioner's alleged cause of action was not "commenced" in a court of competent jurisdiction within two years after same accrued, as required by Section 6 of the Federal Employers' Liability Act.

In the instant case the Supreme Court of Illinois in its opinion (R. 38) said: "Recovery under the Federal Employers' Liability Act is conditioned upon two things: (1) commencing an action within two (2) years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same." The same Court had occasion to construe this Act in Walton v. Pryor et al., 276 Ill. 563, 568-569, heretofore referred to, as well as in later cases, and definitely held that the Federal Act gave an injured person no right to file suit under said act in a state court, **unless that court had jurisdiction to hear and determine such suit.**

In Trapp v. B. & O. R. Co., 283 Fed. 655, the District Court for the Northern District of Ohio, in construing the provision of the Federal Act, with reference to the courts in which suits under said act might be brought, said (page 656):

> "By this amendment, the action arising under that act may be brought in any one of four places: (1) in the district of the residence of the defendant; (2) in the district in which the cause of action arose; (3) in

the district in which the defendant shall be doing business * * *; (4) **in any state court which by the laws of the state has cognizance of the cause of action and may acquire jurisdiction of the parties.**" (Emphasis supplied.)

In Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 56-57, 56 L. Ed. 327, this Court said (page 349):

> "We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, **when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion**, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure." (Emphasis supplied.)

Petitioner's contention (page 22 of his brief), that Section 6 of the Liability Act does not require that actions, thereunder, be brought within the two (2) years **in a court having jurisdiction to hear and determine the same** is well answered by what the Supreme Court of Illinois said in the instant case (R. 37), as follows:

> "If the court has no jurisdiction of the subject matter for judgment, there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the City Court, it would have been absolutely void. (Werner v. Illinois Central Railroad Co., 379 Ill. 559; Mitchell v. Louisville & Nashville Railroad Co., 379 Ill. 522.) The act of a tribunal beyond its jurisdiction is null and void whether without its territorial jurisdiction or beyond its powers. (Welton v. Hamilton, 344 Ill. 82.) A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect, no judgment at all, conferring no right and affording no justification."

The Illinois Supreme Court has uniformly held, for a period of more than 85 years, beginning with the case of People v. Evans, 18 Ill. 361, decided in 1857, that city courts in Illinois created under Section 1, Article VI of the Constitution of Illinois (and under the corresponding section of the Constitution of 1848), have no jurisdiction beyond the city limits. These authorities are reviewed in the **Werner** case, supra, and it is not necessary to discuss them further except to say that in all of them the Court held that the territorial jurisdiction of city courts of Illinois was **limited by the Constitution** and that the Legislature did not have the constitutional authority to extend the jurisdiction of such courts beyond the corporate limits. For the reasons given in the Werner case, and the numerous cases therein mentioned, the so-called Illinois Venue Act, in so far as it authorized the City of Court of Granite City to transfer this cause to the Circuit Court, was in violation of the State Constitution and therefore void. Accordingly, the order of the City Court, admittedly a court without jurisdiction, transferring or changing the venue of this cause to the Circuit Court was a nullity.

Petitioner further contends (Petitioner's Brief, pp. 18-19) that, having begun this suit in a court without jurisdiction, but having changed the venue thereof to one that had jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. Justice Gunn of the Illinois Supreme Court, in the opinion in the instant case (R. 39), answers this contention as follows:

> "The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in the court, the judgment of which, if rendered upon such proceedings, would be wholly void. * * * It

is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like, have any effect when the result, had such proceeding been concluded in the first court, would have been a nullity."

A case in point is illustrated by the facts in Crowley v. Southern Ry. Co., 139 Fed. 851. The Alabama Legislature had attempted to create a Circuit Court with different divisions, but the act creating it was held unconstitutional in Ex rel. Birmingham & Atlanta Ry. Co., 42 So. 118. In the Crowley case the cause of action was claimed to be saved because a summons had been issued out of such illegal division of the Circuit Court, but in commenting upon the effect of this summons the Court said:

"The act constituting the southern division of the Circuit Court of St. Clair County at Pell City being unconstitutional, there was no authority for filing the summons and complaint with Smith or anybody else. * * * The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to institute a 'suit' in the real Circuit Court of St. Clair County as if the plaintiff had filed the summons and complaint with some merchant at Pell City."

In Vol. 21, C. J. S., pp. 177-178, it is said:

"Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity and are a mere nullity and void."

In the case of Inter-Southern Life Ins. Co. v. Pierce, 31 S. W. (2d) 692, it is said:

"Without jurisdiction the Chancery Court of Washington County * * * could make no valid order or decree in the case impairing the substantive rights of defendant. It had no power **to transfer** the case to Greene County."

In Willing v. Provident Trust Co., 21 Fed. Sup. 237, at page 238, the Court said:

> "In the second place, since it appears, as we have seen, that this court is without jurisdiction to entertain the cause of action involved in the original scire facias, it follows that the court has no power to allow an amendment conferring jurisdiction, **since that in itself would be an exercise of jurisdiction.** Holton v. Holton, 64 Or. 290, 129 P. 332, 48 L.R.A. (N.S.) 779." (Emphasis supplied.)

In Manning v. Ketchem, 58 Fed. (2d) 948, at page 949, the Court used this language:

> "When a judge acts in the clear absence of jurisdiction, i. e., of authority to act officially over the subject matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function. * * * In State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.'"

Section 6 of the Federal Act in question is not a statute of limitations pertaining to the remedy, but is a condition of liability constituting a substantial part of the right created (Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433; Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 59 L. Ed. 774; Atlantic Coast Line Ry. Co. v. Burnette, 239 U. S. 199, 60 L. Ed. 226; Bell v. Wabash Ry. Co., 58 Fed. [2d] 569). In Bell v. Wabash Ry. Co., supra, plaintiff relied upon a statute of the State of Missouri, which, in effect, extended the time, as fixed by the Federal Act, in which to file suit. In disposing of this question the Circuit Court of Appeals for the Eighth Circuit said (page 572):

> "It is suggested in the brief of counsel for appellee that there is a Missouri statute providing that if

> plaintiff commenced suit within the time fixed by law, and afterwards suffers a nonsuit, he may commence a new suit within one year from the date he suffers such nonsuit, but surely it would not be contended that a state statute could extend the period of limitation fixed by the Federal Employers' Liability Act, and this is the act upon which appellant's suit is based. **A state statute cannot recreate a right given under a federal statute that has ceased to exist by the very terms of the statute. The liability itself is destroyed.**" (Emphasis supplied.)

The last sentence from the above quotation is a very significant statement and decides the question raised by petitioner's motion to change the venue of this cause to the Circuit Court. A person injured, while engaged in interstate commerce, cannot file a suit in a City Court in Illinois, having no jurisdiction, allow it to remain there five or six years or until the time he is required to file his suit under the Federal Act has expired, and then have it transferred by said City Court to some court having jurisdiction to try the case.

Illinois has a statute similar to the Missouri statute passed upon in the Bell case, namely, Section 24, Chapter 83, Ill. Rev. Stat. 1941, which provides, in part, as follows:

> "In any of the actions specified in any of the sections of this Act * * * if the plaintiff be nonsuited, then if the time limit for bringing such action shall have expired during the pendency of such suit the said plaintiff * * * may commence a new action within one year after such judgment is reversed or given against the plaintiff, and not after."

The Appellate Court of Illinois, Fourth District, passed upon the validity of this statute in Denny & Co. v. Southern Pacific Co., 263 Ill. App. 106, which involved a claim by plaintiff for damages, sustained by it, to certain goods de-

livered to defendant for transportation in interstate commerce. The shipment moved under a bill of lading which provided that suit must be instituted not later than two years and one day from the date the claims are declined. Suit was commenced within this period, but when the case was called for trial on December 5, 1929, plaintiff did not appear and the suit was dismissed for want of prosecution. In the meantime the period of limitations fixed by the bill of lading had expired. Plaintiff then sought to avail itself of the rights **given by the Illinois Limitation Act above quoted.** This section gave the right to the plaintiff to commence a new suit within one year after the judgment of nonsuit against him. Plaintiff, pursuant to this statute, commenced a new suit on December 4, 1930, which was within one year from the day its suit was dismissed, but after the expiration of the two years and one day limitation in the bill of lading. The trial court sustained defendant's motion to strike the plaintiff's statement of claim and dismiss the suit. The question presented was whether the limitation period contained in the bill of lading was the final and only period within which plaintiff could bring suit, or whether plaintiff, having brought suit within this period, which was subsequently dismissed, is entitled, after the bill of lading period of limitations expired, to avail itself of the additional one year within which to bring suit under the Illinois Limitations Act above referred to (Section 24, Chapter 83, Ill. Rev. Stat. 1941). The Appellate Court, in sustaining the action of the trial court, said:

> "We are of the opinion that Congress has assumed exclusive control of the subject of shipments under interstate commerce, and that the conditions named in the bill of lading are binding and exclusive of any State regulations. The very purpose of the federal legislation is to make the provisions regulating interstate commerce uniform without regard to local legislation upon the subject. To permit a shipper to bring suit

> under Section 2 of the Illinois Limitations Act, Cahill's St., Ch. 83, Par. 26, after the period in the bill of lading had expired, would violate this rule of uniformity. The federal law makes no provision for the commencing of a new suit after the period of limitations contained in the bill of lading has expired."

Petitioner has never "commenced" his alleged action within the meaning of the federal statute. An action instituted in a court having no jurisdiction to entertain it is no action in the sense of the statute.

In Sweet v. Chattanooga Electric Light Co. (Tennessee), 36 S. W. 1090, plaintiff brought suit May 15, 1895, in the Circuit Court of Hamilton County, Tennessee, for personal injuries sustained June 23, 1893. The declaration alleged that plaintiff first brought suit in the federal court on June 22, 1894, and that said suit was dismissed by the federal court for want of jurisdiction. Demurrer was interposed setting up the Statute of Limitations (Mill & V. Code, Sec. 3469) and alleging that the action in the federal court was no action in the sense of the statute inasmuch as the Court, in which it was brought, had no jurisdiction, and the action was therefore saved by the provision of Section 3448, Mill & V. Code, which provides that if the action is commenced within the term limited by statute, but judgment is rendered against the plaintiff, upon any grounds not concluding his right of action, etc., a new action may be brought **within one year after the reversal or dismissal.** The demurrer was sustained and suit dismissed. The Supreme Court, in affirming the action of the lower court, said:

> "We think the demurrer was properly sustained and the suit properly dismissed. **An action commenced in a court having no jurisdiction to entertain it is no action, in the sense of the statute. The matter stands the same as if no suit had been brought or attempted to be brought and the limitation runs from the date**

> **of the injury. If the action is brought in a court without jurisdiction the whole proceeding is void and of no effect.''** (Emphasis suppled.)

In Fairclough v. Southern Pacific Co. (N. Y. App. Div. Sup. Ct.), 157 N. Y. S. 862, it was held: Though an action was commenced before it was barred by limitations in a court which had no jurisdiction, it was not brought within the Court's jurisdiction by an amendment of the statute giving the Court jurisdiction, which amendment was enacted and became effective after the limitation period expired. The Court (page 865) said:

> ''Before that date (the date of the amendment) **no action was legally pending,** since long before the plaintiff's right to bring such an action had expired. It cannot be claimed, certainly not with any force, that the amendment gave the court jurisdiction over the action, prior to the time it took effect, as the court was without jurisdiction until that time. The commencement of the action did not prevent the statute running nor did the amendment confer jurisdiction when it did not theretofore exist.'' (Emphasis supplied.)

In Gulf C. & F. S. Ry. Co. v. Gordon (Civil Appls. Court of Texas), 218 S. W. 74, it was held the filing a petition, claiming an amount in excess of the Court's jurisdiction, was not the ''commencement'' of a suit and did not interrupt the running of a statute of limitations. In that case plaintiff filed suit in the County Court for an amount in excess of $1,000.00, the jurisdiction of said Court being limited to $1,000.0. After the limitation period expired plaintiff amended his petition by reducing the ad damnum to $800.00, so as to bring himself within the jurisdiction of the Court. It was held his **suit was not commenced by filing the first petition,** but was only commenced upon filing the amended petition, at which time the suit was barred. The Court said (page 76):

"The County Court was without jurisdiction of the cause of action declared upon in the original petition. The filing of the petition was not the 'commencement' and prosecution of the suit and did not operate as 'an interruption of limitations.' Pecos & N. T. Ry. Co. v. Rayzor, 106 Tex. 544, 172 S. W. 1103, and authorities there cited. However, the filing of * * * the amended petition * * * was the 'commencement' of a suit and did have the effect to interrupt the limitation, if the cause of action had not already been barred before it was filed."

In order that there be a "suit" pending the Court must have the authority to order a summons and must have jurisdiction of the subject matter. In the case of Fidelity Trust Company v. Gill Car Company, 25 Fed. 737, the Court, in its opinion, on page 742 said:

"Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a 'suit' or 'case' in court, the most important of which is, no doubt, that there shall be a tribunal **authorized to issue** that indispensable notice which we call a writ of process, to bring the parties together in the court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a 'suit' or 'case' which can only be when the tribunal undertaking the initiatory steps **is duly authorized to do that thing and proceed with the matter of adjudging between the parties.** * * * Whatever may be said as to the proper definition of the term 'suit' or 'case' in other respects, in this process of inaugurating the procedure by which the controversy is to be judicially determined there must be, ex necessitate rei, **a court having power to set in motion the machinery of the law,** and this we call its jurisdiction over the subject matter." (Emphasis supplied.)

In Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71, the Court said:

> "But it is apparent that a suit is not **commenced until the court has in some manner acquired jurisdiction** of something in relation to the controversy. * * * The court acquires jurisdiction of the plaintiff when he applies for its power and assistance to compel the defendant to render him his rights under the law * * * **when he puts the court or its instruments in motion under his claim his action is commenced.** * * * Jurisdiction has been defined to be the power to hear and determine a case. It is coram judice whenever a case is presented which brings this power into action. * * * Now, the court is powerless to act until it acquires jurisdiction, **and plaintiff has 'commenced' his suit when he has possessed the court of jurisdiction and power to act in the case.**" (Emphasis supplied.)

In Vincent v. McElvain, 304 Ill., at page 163, the Court said:

> "It is well established by repeated decisions of this and other courts that a suit or action is **commenced** when a party puts in motion, under his claim, the instruments of the court."

It is apparent from the numerous authorities cited that a suit is not **commenced** until a plaintiff lodges his complaint in some court which has the power and authority to put in operation the machinery of the law whereby the defendant may be made to account and to render unto the plaintiff whatever may be due him. In the instant case, when the petitioner filed his suit in the City Court, the Court was powerless to act, all orders entered by the Court were void, and the summons and service thereof were void. The respondents were not required to respond to the summons. The petitioner in no way put in opera-

tion the machinery of the law. He had done nothing to bring the respondents to the bar of justice. Filing his complaint in a Justice of the Peace Court, or with the clerk of a school board or any postmaster would have had the same effect.

It is the established rule of federal procedure that removal of an action from a state court, which has no jurisdiction, to a federal court confers no jurisdiction on the federal court, even though the federal court would have had jurisdiction if the case would have been originally commenced there (Lambert v. B. & O. Ry. Co., 258 U. S. 377, 66 L. Ed 671; Venner v. Michigan Central R. Co., 271 U. S. 127, 70 L. Ed. 868; Bull v. Chicago Ry. Co., 6 Fed. [2d] 329). Petitioner's suit, being predicated upon the Federal Employers' Liability Act, it would seem that the same rule would apply where a case is transferred, by change of venue, from a state court having no jurisdiction to another state court.

The reasoning of the petitioner, that, although the Constitution prohibited the City Court from taking jurisdiction in this cause, nevertheless it had jurisdiction to enter an order changing the venue, is not sound. This is a novel argument in that the petitioner admits no jurisdiction in the City Court, yet insists that it had authority to enter a judicial order.

In conclusion, we submit: (1) That the record in this case presents no federal question; that whether or not the Circuit Court of Madison County acquired jurisdiction to hear and determine this cause, was a matter purely of local law to be determined by the state courts, and that this court is without jurisdiction to review the decision and judgment of the Supreme Court of Illinois; and (2) that petitioner's alleged cause of action was not "commenced"

in a court of competent jurisdiction within two (2) years after the same accrued, as required by Section 6 of the Federal Employers' Liability Act. For the reasons above stated, we respectfully submit that the petition for writ of certiorari filed herein should be denied.

Respectfully submitted,

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